IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CONNECTEL	)	
	)	DOCKET NO. 2:04cv396
-vs-	)	
	)	Tyler, Texas
	)	10:30 a.m.
CISCO SYSTEMS, INC.	)	May 18, 2005

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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P R O C E E D I N G S

THE COURT: Please be seated.

All right. Ms. Ferguson, if you will call the case, please.

THE CLERK: Court calls case No. 2:04cv396, ConnecTel v. Cisco Systems, Inc.

THE COURT: Announcements, plaintiffs?

MR. PEREZ: Dan Perez representing ConnecTel from Winstead Sechrest and with me is Julie Robertson, Mark Calhoun, and Garreth Sarosi. And also with me is Local Counsel Brad Seidel.

THE COURT: Good morning.

On behalf of defendants?

MR. BAXTER: Your Honor, Sam Baxter, McKool Smith. With me is Eric Lamison and Adam Alper. We are ready.

THE COURT: All right. Very good. All right. Y'all can't get along on your preliminary infringement contentions; is that correct?

MR. BAXTER: That's correct, Your Honor.

THE COURT: What seems to be the problem?

MR. BAXTER: Mr. Lamison is going to explain it, with the Court's permission.

THE COURT: How long do you think your presentation is going to take, Mr. Lamison?

MR. LAMISON: Probably about 20 minutes.

MR. PEREZ: Your Honor, I can get in and out in less than ten.

THE COURT: Okay. Very good.

MR. LAMISON: Your Honor, on behalf of Cisco we have moved to compel ConnecTel to provide a supplemental chart complying with your Patent Rule 3-1(c), which requires the plaintiff to prepare with its preliminary infringement contentions a chart identifying specifically where each element of each asserted claim is found within each accused instrumentality. That is the rule under which we have presented our motion.

And by way of an overview, there are four issues that have been presented with the preliminary infringement contentions that have been provided by the plaintiffs. By way of background in this case, ConnecTel asserts 120 claims from four patents against more than 100 products seeking, according to their Amended Complaint nine billion dollars in damages from Cisco. This is a complex case where they have asserted the patent claims against the vast majority of products that Cisco makes. It is a very big case in terms of the number of products that are at issue.

In order for us to defend the case and to orderly progress the case toward orderly claim construction, it is necessary for us to understand why each of these more than 100 products are alleged to infringe each of 120 claims. It is

important for us to have that information so that we can prepare claim constructions for Your Honor that are limited to those terms that are actually in dispute so that we don't present Markman briefing on more claims than are necessary or miss claim terms that may be needed to be addressed. And without an understanding of where the infringement is, it is impossible for us to efficiently do that.

So what I would like to describe are the four issues with their contentions, and then I have some specific examples on slides to illustrate this.

First of all, they don't address each accused product but instead they have addressed four categories. Those four categories that they have created are routers, switches, gateways, and a category called the IOS operating system. They use each of their four categories as a surrogate for all of the products within that alleged category. So we do not have a chart that provides a contention with respect to any single specific Cisco product that is accused in this case. Not one. It is a summary chart.

The second issue, which we will show in more detail, is that this confusion is compounded by the fact that most of their charts simply mimic the claim language. The left-hand column, as we will show Your Honor, has the claim language. The right-hand column has the claim language with the word "Cisco" for the vast majority of the elements. We do not have

a circumstance where they have walked us through from beginning to end one claim with respect to even one product.

The third issue is that what they have done instead is they have provided footnotes, 600 footnotes where they say that is where you can find the identification of the accused element. Out of those 600 footnotes, 590 simply say "see supra." Ten footnotes, approximately, have text. But that text is not a description of the infringement. It is references to page numbers and Cisco data sheets.

Of course, when we go to the Cisco data sheets we are not able to determine which passage or which quote or which portion relates to the claim elements and, therefore, it is basically left as -- essentially it is a treasure hunt, but there is no treasure.

By way of background, as I mentioned, what is the harm? We want to move this case forward orderly and efficiently because this Court is well-respected for moving patent cases to trial; under this Court's rules, very prompt trials. I practice in San Francisco and we have similar rules, but our courts don't move these cases as quickly to trial. Cases tend to take three years to get to trial. That is not the way things work here. This Court is well-respected for promptly moving cases to trial and using those same rules but in a different way.

This Court uses the rules to make sure the parties

move their cases to trial. If we don't know what our 100 products that they are seeking nine billion dollars in damages are allegedly doing to infringe, how do we identify claim terms under this Court's docket schedule where we are supposed to provide claim constructions on June 16th? We have had to identify more than 75 claim terms for potential construction, not because we want to construe 75 terms. We don't. We certainly don't want to brief them, and we certainly don't want to burden this Court with terms that may not be necessary.

But if we don't know how they are applying the claims, we are stuck because we are going to lose the date. We might not put the term on the table. Then we find out how they are applying the claims. Then we say this is the term to construe. We will have missed our opportunity. We are forced to do all of this work because we don't know why we supposedly infringed. That is the only reason we are here.

We have no interest in filing motions unnecessarily. We are not asking for any sanction. We are not asking for any money. We haven't engaged in name-calling. We have simply said we want to know why, why when I call the client and say these guys are asking for nine billion dollars. Why? I don't know. I have looked through their charts, and I don't know what the infringement is. My colleagues don't know. People we have consulted with don't know. That is why

we are here.

In addition to that on noninfringement you can imagine the number of people we may need to meet with to discuss these over 100 products that represent the vast majority of a multi-billion dollar company to understand, well, if this is their contention do we or why don't we do this, et cetera; but without knowing the contention, we are basically hampered in our ability to do that.

And on invalidity, boy, we would like to know how they are asserting these claims because these products have been around for a long time. Cisco was founded in 1984. More than a decade before Mr. Kaplan, the inventor in this case, first came up with his technology. And Cisco basically came up with the technology that enables Internet work.

A group of Stanford University scientists came up with innovative routing methods. We are innovators in this field, and these products that they are accusing have existed long before Mr. Kaplan's patents. We want to know how they are finding infringement. That is important to understand how these products that have preexisted these patents by more than a decade could infringe but have these patents be valid.

Until they tell us -- and I submit they may be concerned about taking a position because they may be concerned that it is going to lead to a validity question so they are avoiding it. They are avoiding it I think

deliberately so they can move the case forward, pick an infringement theory that they think is going to enable them to maintain validity. And so we are not able to prepare the appropriate defenses, in our view.

I would like to now show the Court an example of their claim charts that mimic the claim language. We have chosen as an example Independent Claim 1 of the '404 Patent, which is one of the four patents in suit. Following the claim preamble, which is the large box at the top, we have the elements of the claim. And under the patent law, as this Court is I am sure familiar, there has to be satisfaction of every element of the claim to be infringing.

And under this Court's patent rules they have to tell us where each element, each element is found in each. So if we go to the steps that I have highlighted in blue and in the column it says the claim requires receiving the data. The claim also requires examining the received data. With respect to Cisco, they say Cisco routers receive data and examiners receive data. That is not particularly helpful. That is what the claim says. They put the word "Cisco" in the right-hand column and that is their identification of that element. The Court will also note there is no footnote on this element because we will get to the issue of whether these footnotes satisfy the rules, which we don't think they do. But in here there is no footnote.

So this element, we are entitled to know where each element -- that is this Court's rules -- each element of each patent is found in each accused product.

Go to the next one.

There is a step of identifying the examined data which matches said one of the one or more first variable parameters. They say, "The Cisco routers identify the examined data which matches one or more of the first variable parameters." It is just a direct quote of the claim language with the words "Cisco" and "routers"; and, again, I don't see a footnote on this one. And also it doesn't tell us why they are doing it.

We can move forward. Step G, "analyzing said measured second variable parameter and said predetermined parameters." What do they say for Cisco? "The Cisco routers analyze the measured second variable parameter and the predetermined parameters." Again, this is simply a direct quote of the claim language with the word "Cisco." It is not informing us of these issues.

And then if I move forward. This claim is a method -- this is of importance -- they are all important, but this is a particularly important step in a claim because this sort of ties all these elements together, this particular step, the determining step. And they simply quote the claim language. Determining which of said patents, et cetera, and

the lower box which is the language from their chart, they just say the Cisco routers do it. That is it.

There is a footnote on this one. It is an interesting story about this footnote because when they served their original contentions on March 17th, there was no footnote at all. So we had a meet and confer about it, and we said, folks, we need to know why we infringe. They said what is wrong with our charts? You copied the claim language. We have footnotes. I said, well, I will get to your footnotes because I don't think they work. But let's go to one of these key critical steps in the claim, the determining step. There was no footnote.

So they served a supplement, and they put a footnote. And the footnote said "see supra" and it goes to some other footnote that had text. So it was just a cosmetic change. So this is an example of the independent claim and the way that they approached it. Now, there are some elements -- this is another example. This is the final element. Again, it is just a verbatim quote transferring the data to the remote destination. "The Cisco routers transfer the identified data to the remote destination." Again, it is an exact quote of the claim language but inserting the word "Cisco."

As you can see also this isn't an identification of any product. This category -- the one that I went through was

for the router category. In other words, they didn't do this -- the chart doesn't refer to any specific Cisco product at any time, whether it is a router, a switch, or a gateway. So we have the issue that they are not telling us the products. They are certainly not going to each element of each product, and it is leaving us guessing.

There were some steps where they inserted little tidbits of information. But that information doesn't -- they haven't done it for each element. They haven't done it for the key element of determining, the one that ties it altogether. Even when they give us these snippets and say, well, this is, for example, the way they do this and they don't really say how it is done with any detail. So I don't think these were sufficient either. But they have never once -- I think from a larger perspective of this claim, they have never once walked us through this claim from beginning to end and shown us where each element of this claim is found in any product. It has not been done.

And in a case where we have more than 100 products accused of infringing 120 claims where they are seeking nine billion dollars in damages I think it would be fair for them to tell us why they think we infringe.

Similarly, we have these dependent claims. These are the ones that come down off independent claims, as Your Honor I am sure is familiar with the distinction between

independent and dependent claims. There are many, many dependent claims in these patents.

With respect to the dependent claims, ConnecTel's charts simply copy verbatim the language. There is no snippet in even the dependent claims. It says this is the claim language. And they insert the word the Cisco routers generally. Again, no reference to a specific product. And nothing other than the quote of the claim language.

Interestingly, when they served the original charts on March 17th there weren't any footnotes for any of the dependent claims. None. So we asked them on the phone; and, again, I will get to the footnotes because I don't think that works for them. But they said the footnotes are the solution. There is not a single footnote against a single one of the dependent claims. How do you explain that?

They said we can fix that. So we spent all day on the phone meeting and conferring with them on the following day trying to get these contentions. The result of it is they have sent us over a supplement and they have added a footnote to each dependent claim; and as the Court can see, each one of those footnotes says "see supra." There is no new text, there is no new information. It is just referring us back to a footnote. It really was difficult to try to advance the ball forward and get some further information.

And here is an example of what these look like. 590

of the 600 footnotes say "see supra." They don't have any text at all, let alone a reference to a document or let alone reference to a passage in a document. I would now like to address those few footnotes out of the 600 footnotes that have text. What that text is are string citations to multiple Cisco data sheets that they provided in binders with their charts. Those string citations which are not -- first of all, they didn't footnote every element. Even in those instances where they did footnote it we have gone to these and they have provided references to pages of data sheets.

We are unable to find on those pages of data sheets the alleged claim element. We are not able to find it because these pages have lots of text on them and we are not able to find on these pages where the element is because they haven't told us. They haven't told us. They believe that -- their hope is that because they provided four boxes -- or binders of documents, that one would conclude they must have complied with the rule because they have given us this very large massive piece of information, so it must comply with this Court's rules. But it doesn't.

We don't know -- we are entitled to a chart. The language is rather specific. A chart that specifically identifies where each element of each asserted claim is found in each accused product. We just don't have that. And these footnotes which are sporadically used, again, 590 of 600 just

say "see supra." Few of them have these references to pages. We are not able to lift from these pages where the element is found on that page.

We don't think the elements are there. That is one of the issues, but certainly they should have to put them in the chart so we can see them. This is an example of what a page looks like. There is lots of text on the page. We go to the page, but we don't know where the element is.

The other thing they did when they supplemented was they said, okay, well, it sounds like you guys don't understand your products. So to help you understand your own products we are going to send you a nutshell tutorial about Cisco IOS. They sent us a book saying -- we are going to help you understand your products. The issue isn't that we need help understanding our products. The issue isn't that our Cisco folks that we interact with to follow this case don't know how their products work. The issue is they haven't told us where the infringement is in our products. That is why we are here. And providing a third-party nutshell about our product doesn't meet their obligation to tell us where it is.

In sum, the charts simply mimic the claim language. They don't identify a single structure, process, algorithm, feature, or function of any accused product. We did wish to meet and confer. We certainly don't want to spend our time on motion practice. We very much wish to resolve this issue

without the Court -- needing to seek the Court's intervention.

After our first meet and confer the parties agreed to have a second meet and confer where they would spend essentially a full business day on the phone talking to one another and walking through the claim and see if we could get the information and then discuss an appropriate supplement. Two lawyers in my office spent a full day on the telephone with counsel for ConnecTel. We also had the resources of a consultant available. And basically said let's walk through one claim from beginning to end and show where the infringement is in one product or a few products.

We tried to do that, but we were unable through that call to determine how even one product infringed one claim. In fact, ConnecTel counsel mentioned that they had further facts they had learned in their prefiling investigation, but they contended those facts were privileged from discovery and that we were not entitled to know those facts.

After that meeting they served supplemental picks to reflect the meeting; and as we have shown, those supplemental preliminary infringement contentions did not provide any more information. They just added multiple hundreds of footnotes that said "see supra." They didn't do anything to provide more information. They added footnotes to all of the dependent claims that said "see supra." They didn't provide

any more information. Yet we spent -- two lawyers a full day on the phone. And we couldn't get one -- the identification of the infringement of one claim against a few products.

And Mr. Perez kindly sent me a letter offering to continue to have such discussions. He said in his letter -- you know, the parties were only able to discuss one claim with respect to a few products. We spent the whole day, two lawyers on the telephone, one claim and a few products. We have 120 claims and more than 100 accused products. If that is what it takes to try to figure out their theory and we didn't, we weren't able to get it, it confirms they need to put it in the chart so that we can take it from the chart.

So that was the only reason that we said, you know, these dates are clicking by. At this point we have to focus on getting a motion to Your Honor. We also had to do our invalidity contentions. This was in early April when we had this last discussion when he said at this point we need to move toward. One of the things they criticize in the briefs is they say it took us three weeks to get our motion papers together. The reason it took us three weeks to do it was in the middle our invalidity contentions were due. We didn't have a clue how they were applying the claims.

So when we did -- we had to think about it from this very vast perspective of how are they applying the claims. It took us an enormous amount of time to put those

together, I submit far more time than it would have or should have taken if they had told us up front under Your Honor's rules why we infringe, how they are applying the claims. We could have certainly spent less time putting that together than having to guess how they are applying the claims. And so we wanted to file the motion. We also wanted to comply with the rules.

And we, therefore -- it did take us three weeks to get this motion on file because we were busy trying to comply with this Court's rules on the invalidity contentions which were due at that time, right in the middle. They never did in that offer say we offer to provide more information. In fact, they never in their papers said we will supplement. They say, well, we may need to supplement in the due course of discovery. But they have never once said when they will do it. They have never said we are going to supplement. And they have certainly never said we are going to supplement before Cisco has to provide all of its claim constructions in this case.

To the contrary, what -- the way they are doing this is they are going to supplement when it is convenient for them without regard to what this Court's scheduling dates are. So by the time we figure out why they say we are infringing, we will have already had to provide our claim constructions. We will already be in the Markman briefing, and that is not the

way that Your Honor's rules are designed. That is the antithesis of the orderly progress of this case that Your Honor's rules dictate that enable this Court to have such a tremendous reputation for moving cases towards trial very promptly and very efficiently.

This issue about the facts, by the way, that they say we are not entitled to the facts they have obtained in the prefiling investigation, I believe that is inconsistent with the longstanding rule that underlying facts are not privileged. We are not asking for their documents that they created. We want the facts put into the chart. The underlying facts aren't work product --

THE COURT: Slow down just a little bit for the Court Reporter.

MR. LAMISON: Sorry. The underlying facts are not protected from disclosure. That is a longstanding rule. We even cited some of Your Honor's decisions that acknowledge that, and appellate court decisions. It is a pretty universal rule. And similarly, while we didn't cite those cases, it occurred to me while I was preparing for the argument last night, that is similar to something people say when they are asking for contention interrogatories. And they say, well, that is a contention interrogatory. And they say, well, I am going to object on work product. And there are many cases that say you can't object to a contention interrogatory on a

work product basis. In fact, it does require you to put your mental impressions and theories into the chart.

The facts, and to a certain extent a contention interrogatory, does -- it gets how are you applying the claim. You have to disclose it. And these rules are meant to do away with the need to have these interrogatories and to do it through the rules. But it is the same concept. You are supposed to get the contentions. And the underlying facts nor are the contentions privileged. They shouldn't be entitled to have contentions about why infringement is occurring but hold them back until they feel it is safe for them to put them on the table and we are done with the claim construction.

Interestingly, as part of their response they say they need access to our information in order to provide those contentions. A few points on that. It is worth noting that they just -- they didn't plead this case on information and belief, but instead they specifically pleaded that over 100 products "blatantly infringe" the asserted 120 patent claims. In fact, they just filed an amended complaint less than two weeks ago where they specified these products in the Complaint and they say they blatantly infringe.

I have been practicing ten years in this space. Not a long time, but a fair amount. I have never seen a complaint where somebody uses the word "blatant" in front of infringement. I have seen willful. I have seen various

allegations, but blatantly infringing is a pretty bold statement. If the infringement is blatant, why do I have to go trancing around through these charts to footnotes, to supras, and this and that and not be able to find out how a single product infringes a single claim?

They are not saying in their Complaint that they don't know. They are saying the exact opposite. They are saying it is a blatant infringement. Where is the blatant infringement in their chart? It is not there. We believe that request is consistent with the relief that Your Honor ordered in the American Video Graphics case in which my colleague Mr. Baxter was involved and ordered a supplementation of the preliminary infringement contentions 30 days after the production of documents.

What we have asked for in this case is supplementation. We haven't asked for any money or sanctions. We want them to tell us, and we would sure appreciate an order from Your Honor that says you have got to do this, folks, you have got to do this. You have got to do it at a particular time, and this is that time. And that is what is going to happen. That is what we asked for. And I think the relief we have asked for is very consistent with what we requested in American Video Graphics. Frankly, I don't care what they look at. I am not trying to say you have to tell us now based only on this bucket of information. They are accusing me of trying

to set up a Rule 11 claim.

Whether there is a Rule 11 claim or not, I just want to know why we have infringed so we can defend the case. That is far more important, so I am not trying to box them in on what document they had at what time. I just want to know. I don't frankly care what they look at; but if the belief is that they are not really going to tell us, one, what they already know, which is more than what they have told us; and, number two, they are just going to wait and do it after we go through discovery and we get done with the claim constructions, that is just not fair. It is not fair. It is not consistent with the way this Court would like to progress the case under the patent rules to a prompt trial. We really do need this information before we provide claim constructions.

THE COURT: Okay. Thank you.

Response, Mr. Perez?

MR. PEREZ: Yes, sir. Your Honor, when I was challenged with the opportunity to present picks to you in this Court, I did my due diligence. I went to Glenn Thames, Local Counsel, with Potter Minton and I asked him what do you have to do when you present picks to Judge Davis and actually the way you have done in front of Judge Ward? And I got various samples of what is done before you, Your Honor.

Likewise, I am on the defense side of three cases

pending in the Eastern District of Texas, and I have seen several picks presented to me; and candidly I was a bit frustrated because they were too vague for me. I wanted these to be thorough and detailed. I went to extra efforts to make sure we were thorough and detailed. I want to walk you through and illustrate what we did for Your Honor. And, likewise, Your Honor, I went through your case of March 17th, 2004 and then your recent case the March 11, 2005 and relied upon those.

Your Honor, I have done everything I believe necessary, and candidly I think we have gone beyond that. I am going to show that to you here in just a moment.

We did all of this without getting access to any source code or confidential information from Cisco. We went on Cisco's website and we went to publicly-available information to get our infringement contentions. And, likewise, we relied upon a consulting expert who had some core work product that we got involved in and learned and patent lawyers, EE's got involved and did the analyses. We put together in our infringement contentions a thorough analyses, which incorporates a lot of the core work product. I understand that. That is what he was alluding to.

What I do find a little troubling, Your Honor, is he puts in front of the board the '404 Patent. The '404 Patent is a patent we didn't even discuss. It was a patent he wasn't

willing to discuss. We discussed the '307 Patent for one full day. He brought to our attention two elements he thought were important to give more detail on. That is a determining step and some more information on the dependent claims.

What we did was we supplemented. And after we supplemented we invited him to meet and confer with us longer. And instead of meeting and conferring with us for 21 days, he teed up this motion, and we are here today, Your Honor.

Let me tell you a little bit about the technology first in the invention and then I want to go to the claim charts and walk through what we did for Your Honor and for this Court. What ConnecTel patents are, is it was the first time there was the use of a unique combination to optimize the transmission of data from point to point, from Dallas to -- if you are in New York to New York. What they did is they analyzed, or the patent talks about is analyzes the property of the data, what are the characteristics of the data.

It also incorporates factors of predetermined parameters, such as, is it priority mail? Is it important for it to be secured? Is it a large package? Is time not of the essence? Likewise, on a real time bases -- and this is important, Your Honor -- on a real time bases it determines the condition of the path, the pipeline so to speak, and optimize that pathway through algorithms. And by their nature, Your Honor, algorithms are embedded in the source

code. And certainly we did point to intelligent routing, optimization, language in their product spec sheets that alluded to that. And, candidly, Your Honor, I have offered many times to supplement these picks after we get access to the source code. The first time they were made available to us? Yesterday. Let me get into the analysis, Your Honor.

THE COURT: Do you have all of the source code you need now?

MR. PEREZ: You know what, Your Honor, we don't know that. We have asked them to characterize the volume and to characterize what they have given us. They haven't given us that. Garreth Sarosi over here went over there yesterday and tried to do an assessment of what the source code was and to what extent we have all of the versions, and I can't tell you in all candor that I know. We hope in the next week or so to find that answer out. We will have our consultant go down there. We have a few more hoops and loops we have to go through under the protective order. And that is kind of important to this -- and if I am talking too fast for the Court Reporter -- I'm sorry. I will slow down.

There is some things that we have to go through in order to get access to the source code. We have our expert vitae that we are going to give over to counsel probably tomorrow, let them look at it, and they are going to have access to that source code to look at it and analyze it.

And, by the way, Your Honor, the reason why the Court entered the protective order as late as May 9th is because we didn't use this Court's standard protective order because Cisco didn't want to. And you know what, we negotiated a long time on that protective order. They wanted a protective order --

THE COURT: Okay. Let's go on with --

MR. PEREZ: Yes, sir. Let me go ahead and get the claim charts. I am going to walk around if you don't mind, Your Honor.

THE COURT: Okay.

MR. PEREZ: I don't have electronics, which I should have. But I do have a three-ring binder for you to look at, and you can look at it along with counsel. Counsel has samples of those exhibits. Your Honor, there may be more exhibits than are necessary. But I am prepared to go ad nauseum if necessary to show you what we have done.

Here are claim charts. This one is the '307 Patent Claim No. 1. This is the only claim -- we actually had a conversation with counsel, the only one. We tried to go over what we did. Looking at the footnotes that are -- that they say have no substance, let me give you an example of what we have done. Here I will walk you through Footnote 3, which is the determining step. I will walk you through property of the data file step, and I will walk you through their parameter

step -- Your Honor, if you want to go through more we sure can.

Here are the footnotes we are referring to. These footnotes, they don't gloss in point to a product spec sheet. As you can see, Your Honor, for example, on the second -- the Footnote No. 3, Tab No. 2, we refer to a specific Cisco Internet router data sheet picks -- 1, 2, and 3. You go to Footnote No. 3. We refer to the IOS -- the "Cisco IOS In A Nutshell," Pages 101 to 127. We have a copy of that if you would like to look at it. And also Tab 32, which is a routing data sheet. Page 1 and 2 and 4 and 7. So if you look at the first determining step, and that would be Pages 1 and 2, 4 and 7, you have to ask yourself does it support that determining step.

Your Honor, the determining step is actually described -- and I have highlighted just a portion of it. "Cisco's OER helps enable the intelligent path selection of a plan edge based upon performance sensitive routing metrics such as time, loss, path availability, traffic load distribution, and cost minimization." It actually goes on to what I talked about earlier. It is this real time routing adjustment based upon performance that makes Cisco's OER an important building block for building highly available path access across Internet.

And I also want to refer to another page just on

that one footnote. We refer to Page No. 2 which refers to performance parameters, which are the variables I am talking about that are being weighted. Let me -- I apologize for the encumbrance of these things. Also refer to Page No. 4, which talks about route optimization and performance characteristics. This is just one element from one patent of one product.

Furthermore, I would refer to Page No. 5. Again, it talks about different measurements and things that you would consider in your optimization step, Your Honor. That is the determining step. That is just one product, that product being the Cisco 10720 referring to one element of one patent. We did that for each and every product. Here are the claim charts -- and I apologize to this Court, and I did in my brief that we actually listed this as an attachment when we filed it. It was very cumbersome. But it is not just to illustrate the voluminous nature. If you go in reverse order you have a binder for routers, which are some 20-something, switches, gateways, and the IOS software.

We went to the Cisco website and we pulled the specification sheet and then we went claim by claim, element by element for each and every one of those. Your Honor, I think that goes above and beyond. Certainly put them on notice. And the reason why it put them on notice is when they gave us their invalidity contentions they gave me three boxes

of invalidity claim charts and a disk that was equivalent to 100 boxes of documents. I think they know what we want.

If we want to go further, Your Honor, I can talk about the property of the data file. I can go through that. I also have some other handouts for you about the routers and the gateways. I think you know what I am getting at. I can give you some illustrations, Your Honor, of the dependent claims. I think that is probably important, as well. I can go as long as you would like.

THE COURT: I have seen what you have done.

MR. PEREZ: Got it. Let me go back, Your Honor, over here. I have given you in that handout --

And, Julie, would you mind giving them a copy so they can have access to them.

A sampling of what we did for our independent claims, what we did for our routers, and what we did for gateways.

Yeah, there is common language. And the reason there is common language is you can only call a property of the data so many things. And we refer to the same footnote. And they make fun of my supras. Well, they ought to read the supras because the supras relate to actual text in those product spec sheets.

Similarly, Your Honor, the products themselves, the families of the products. They said there was 110 products.

I can show you examples of product spec sheets that are almost -- revised. So a lot of their products on their website, and there may be ten products, eight products that have almost the same description. So, yeah, it is repetitive in nature. I understand that. But I think it is thorough.

Again, Your Honor, we did all this without access to confidential information. And when we get the confidential information, when we get the source code, we will supplement. We have said that in our briefs, and I have said that to them on the phone.

I do have to rebut a couple of points they made, Your Honor. And I said it once, they never discussed with us, they never picked up the phone and asked us about the '404 Patent that they threw up on the board. If they had asked us, I guess -- my question is what do you want to know? Ask me. That is what I asked in the correspondence and asked them on the telephone. When they asked me about the claim '307, I gave them the determining step. When they talked about the shortness of explanation to the dependent claims, I gave them back-up for each and every dependent claim.

I don't think they should be mocking me giving them the "Cisco IOS In A Nutshell." We found it helpful. I guess it refers to Cisco's networking simplified. It has the same kind of language. I wanted to make clear to them what I was looking for. Again, I think that their production to me in

the invalidity claim charts made that real clear.

Your Honor, we will supplement. But in your two opinions that are out there, I notice some very interesting language. One -- in one particular case, it was your first case, you made mention -- it was AVG case. You made note that since counsel is at an impasse, I have got to rule. The only impasse here was they are willing to drive in my direction after I invited them to. I would love to open up this dialogue. I would love this Court to make us open up this dialogue. We will supplement to the extent necessary. We want them to know what they are being accused of infringing because we don't want this case to go offtrack.

We complied with this Court's mandate, both under the ST Microelectronics and under the American Video Graphics. We just got access to the source code. And we will beef up our claim charts as required and as necessary.

THE COURT: All right. Mr. Perez, I think you are reading ST too broadly and American Video Graphics too narrowly.

MR. PEREZ: Tell me, sir. I will be pleased to address your concerns.

THE COURT: Well, I want to ask you are you serious about this lawsuit?

MR. PEREZ: Yes, sir.

THE COURT: As the Court expects plaintiffs when

they file a case to be able to identify their infringement contentions, and I don't think that you have complied. You know, it concerns me that you are alleging 120 claims and 100 products. And I hope this is not some kind of just shotgun, throw everything up and see if we can find something that sticks. But I am sympathetic to Cisco's position, and we need to talk about what kind of relief to give them to get this thing back on track. This thing is set for trial in August -- on August the 14th of 2006.

MR. PEREZ: Yes, Your Honor.

THE COURT: And for this Court to be able to move cases as fast as you would like for this Court to move it being the plaintiff in this case, we have got to have greater compliance than what I think you have given here. I don't think repeating the claim language and I don't think string citing back to their literature is enough.

Now, I want to know what does Cisco need to know what this lawsuit is about?

MR. LAMISON: Thank you, Your Honor. We would like to have supplemental contentions that do provide the infringement. We would like, ideally, to have those 30 days before we have to provide claim constructions. That would be the -- that would be very helpful. It would enable us to focus the claim constructions and not have to overconstrue or underconstrue. And with respect to the discovery --

THE COURT: Would exemplar examples be helpful to you?

MR. LAMISON: Absolutely.

THE COURT: That is one thing I noted that you don't give a single exemplar example of stepping it through as to this particular type of product.

MR. PEREZ: Your Honor, what I can certainly do for Cisco and for this Court is to do precisely what I did in the highlighted areas. I have referred to pages as descriptions of where those elements exist. I have -- and Your Honor, it was something that certainly we are more than willing to share. Obviously this is work product. But we have our claim charts; and we refer to, for our own edification, highlighted areas where those very elements -- for example, on this one, Your Honor, exist. Here we are talking about property of the data. These are features of virtual private networks over IP. I can refer to those highlighted areas with the understanding, of course, it may be in other portions of the text. I can refer to specific highlights within the data sheets that I have identified.

THE COURT: Are you going to expect this Court to construe 120 claims?

MR. PEREZ: Your Honor, I don't believe that is going to happen, no, sir.

THE COURT: When are we going to get it narrowed

down?

MR. PEREZ: I will have it narrowed down within probably 60 days once I have seen their source code analyzed and I can back off on some of those claims. I would suspect this thing would be trimmed down to less than 50.

THE COURT: Okay. What else do you need?

MR. LAMISON: We would like an order similar to the one in American Video Graphics that orders them to supplement within "X" number of days of the documents being provided. I think that is the best way to insure we get the information.

THE COURT: When are you going to provide the documents?

MR. LAMISON: We have started to do that and -- as fast as possible. The protective order unfortunately took a long time. It was proposed even before the docket control order was in place. There were disagreements over whether we were -- what third parties or special protections for source code. It took an inexplicably long amount of time to come to an agreement on that, and we were pushing very vigorously to get the protective order in place, so -- that is not because we weren't willing to talk to them. We were very vigorously trying to get that in place.

So we have certainly got source code that is in Mr. Baxter's office right now that Mr. Sarosi came over to see yesterday. If they want to see every single version of source

code, that is quite a bit --

THE COURT: Is that what you want to see or exemplar --

MR. PEREZ: Your Honor, I will probably need to see more for the past devices. There are certain devices I have alleged that are present devices as of the first quarter of 2005. Some of those devices may fall out once I look at the algorithms of the current source code, but there are some past devices that may be infringing -- those are documents that were requested. I assume we are going to get those, so I may need to see some older versions of the source code to verify certain algorithms.

THE COURT: What else do you need?

MR. LAMISON: That's what we need.

THE COURT: What do you need?

MR. PEREZ: I do need to get expedited them approving of the experts looking at it. I have got to have access to McKool's office in Dallas and get our people in there to look at the source code and unravel it. Your Honor, I think 30 days is a little bit tight given we just got access to the source code. I would propose 60.

THE COURT: What is this going to do to your schedule?

MR. LAMISON: Well, that is the issue. In fairness what we want is to have these contentions before we have to do

the constructions. I think for 120 claims and 100 products, 30 days to look at that would be appropriate. I think 60 days to do this from, for example, today, then that would be 90 days which would put us out to -- that would put us into mid-August rather than June 16th, which is the current date. August 16 would have been the discovery deadline for claim construction.

THE COURT: Do you have any problem with that?

MR. PEREZ: Which one, Your Honor?

THE COURT: Pushing it out to August.

MR. PEREZ: I don't have any problems providing our Markman Hearing doesn't move and our trial date doesn't move.

MR. LAMISON: I don't think we need to move the trial date. I think we could probably try to work together about the Markman date and some of those later dates to preserve the trial date.

MR. PEREZ: We have talked about actually and I have agreed to moving it -- any of the two weeks after Thanksgiving. It is now set for November 17th. They wanted to kick that because they have a conflict of trial. We are willing to do that, obviously, at the Court's convenience.

MR. BAXTER: Your Honor, I communicated to the Court staff about the Markman Hearing. In all candor, when I talked to the staff they looked at your calendar and you have got some trials and some other dates that may conflict. I didn't

want to wade off in the swamp without revealing that. The Court staff has looked at your calendar. And we had asked not because of these problems but because of the trial conflict one of the lawyers in this case has. I don't want the Court to move the day without knowing that your staff at least understands that you have got some date problems.

THE COURT: Okay. All right. The Court will -- is going to enter an order. We will have it out to you by the end of this week outlining for you what you need to do and adjusting the dates as the Court deems appropriate.

Anything further from the parties?

MR. BAXTER: No, Your Honor.

THE COURT: All right. I would just admonish both parties, and I don't know which side the communication is -- I hear both of you saying we are wanting to talk and the other one is not talking. Let's talk. Let's get these things resolved. Let's be candid with each other. Let's don't be hiding the ball. Let's get it out on the table, find out what this case is about so y'all can evaluate it. And if you can't get it settled, we will get it narrowed down to something triable and we will try it. Okay?

MR. PEREZ: Thank you, Your Honor.

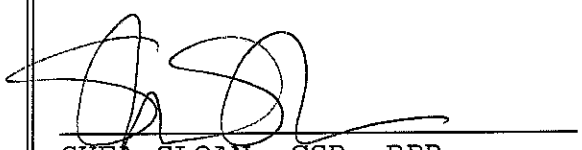
THE COURT: We will be adjourned.

MR. BAXTER: Thank you, Your Honor.

(End of hearing.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



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